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No. 83-219

In the

# Supreme Court of the United States

OCTOBER TERM, 1983

GARY McDONALD,

*Petitioner,*

*vs.*

CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELIAS, CITY ATTORNEY; UNITED STEEL WORKERS OF AMERICA, DISTRICT 29,

*Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit.

## BRIEF FOR EDWIN F. MANDEL LEGAL AID CLINIC AS AMICUS CURIAE

GARY H. PALM
EDWIN F. MANDEL LEGAL AID CLINIC
of the University of Chicago Law School
and United Charities of Chicago
6020 South University Avenue
Chicago, Illinois 60637
(312) 962-9611
*Attorney for Amicus Curiae*

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With the consent of the Petitioner and the Respondents, the Mandel Legal Aid Clinic submits this brief as amicus curiae in support of the Petitioner, Gary McDonald.

## STATEMENT OF INTEREST

The Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School, in existence since 1959, is dedicated to protecting against and remedying deprivations of constitutionally protected rights. The Clinic regularly represents persons who bring claims against state and local government employers. Many of these persons have proceeded to grievance arbitration prior to bringing their statutory claims. The application of preclusive effect to arbitration decisions in actions brought under the federal civil rights statutes would substantially restrict the relief available to these clients.

## SUMMARY OF ARGUMENT

Arbitration of Petitioner's grievance should not bar his right to bring an action under 42 U.S.C. §1983 arising out of the same facts as his union grievance.

Arbitrations do not have sufficient procedural safeguards to adjudicate §1983 and constitutional rights. Arbitrators do not generally have sufficient expertise to apply federal civil rights statutes or the Constitution. Even if they did, their authority is limited to the contract. This limitation requires that where a statute and a collective bargaining agreement conflict, the arbitrator must apply the contract. If the arbitrator rules that §1983 supercedes the contract, the arbitrator will have exceeded the scope of arbitrable issues, and the award will be unenforce-

able. Moreover, if an arbitrator had the authority to apply §1983, the contract may still limit the availability of relief in the form of damages.

Most significantly, the aggrieved individual does not control the presentation of his grievance at arbitration. Rather, the individual's case is controlled by the union. The individual does not select the attorney who presents the grievance and is not permitted to be represented by his own counsel. Indeed, the individual is not even a party to the arbitration decision, and is therefore not entitled to independent judicial review of the award. Furthermore, because the arbitrator is usually selected by the union and management, the interests of the individual may not be the arbitrator's paramount consideration. Since Petitioner lacked

control over the presentation of his case at arbitration, he was also denied a "full and fair opportunity" to present his claim. The procedural inadequacies of arbitration and the limited subject matter jurisdiction of the forum combine to foreclose giving preclusive effect to arbitration decisions. To give preclusive effect to arbitration decisions in §1983 actions would violate federal law standards of preclusion and due process of law. Likewise general rules of preclusion as set forth in the Restatement (Second) of Judgments (1982) would not accord either issue or claim preclusion to the arbitration in Petitioner's §1983 action.

In effect, the jury trial below was Petitioner's first "full and fair opportunity" to independently present his §1983 claims to a court of competent jurisdiction through

counsel of his own choosing. Therefore, the District Court's judgment should be reinstated, and the Circuit Court reversed.

General rules of preclusion apply to §1983 cases. Allen v. McCurry, 449 U.S. 90 (1980). Where an employee raises a federal statutory claim involving rights conferred upon him as an individual, rather than by a collective bargaining contract, the Court has held that prior arbitration of grievances arising out of the same events will not preclude an individual from independently seeking to vindicate his statutory or constitutional rights before a federal court. Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). Moreover, the Court has concluded that labor arbitration decisions

are not accorded preclusive effect under 28 U.S.C. §1738, the federal full faith and credit statute. Kremer v. Chemical Construction Co., 456 U.S. 461 (1982).

Rights under §1983 are vested in the individual. Prior to the enactment of this statute, no individual actions were provided to redress deprivations of constitutional rights by state and local authorities. Plaintiffs are granted direct access to federal court to enforce the rights provided by §1983. Indeed, the federal courts have the primary responsibility for enforcing these rights. Under §1983, exhaustion of alternative remedies is not required. Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982).

Alexander v. Gardner-Denver's holding that rights under Title VII of the Civil Right Act of 1964, 42

U.S.C. §2000e, et seq. may not be waived by a collective bargaining agreement to arbitrate contract disputes controls here. As with Title VII, §1983 protects individual civil rights. Petitioner may only be deemed to have waived his individual right to resolution of his §1983 claims by jury trial through an independent, voluntary, and knowing waiver agreement with the City of West Branch.

Since a collective bargaining agreement represents the choices of the majority of the members of a bargaining unit, an agreement to arbitrate contract disputes does not prospectively waive an individual's right to bring a §1983 action. Nor does actual submission of Petitioner's claim to arbitration constitute such a waiver, since it would be without consideration. Petitioner always had the right to proceed to arbitration

under the collective bargaining agreement and exercise of this right would be an unwarranted concession for waiving his right to bring a §1983 action.

Affirmance of the Circuit Court decision would not only sacrifice Petitioner's individual rights, but may have the consequence of increasing the federal caseload. Faced with a choice between §1983 rights and contract rights, many will prefer the former and forego use of grievance procedures. Furthermore, since §1983 enforces constitutional rights and the agreement to arbitrate enforces contract rights, there is no inconsistency in allowing deprivations of both these rights to be redressed in their appropriate forums.

## ARGUMENT

I. A LABOR ARBITRATION OF A UNION GRIEVANCE SHOULD NOT BAR AN EMPLOYEE'S ACTION UNDER 42 U.S.C. §1983.

A. Labor Arbitration Does Not Provide a Grievant with an Adequate Opportunity to Litigate Statutory or Constitutional Claims.

It is the position of Amicus that this Court should follow its prior decisions and decide not to give preclusive effect to union grievance arbitrations in §1983 actions. Allen v. McCurry, 449 U.S. 90, (1979) held that general principles of preclusion and the standards of the federal full faith and credit statute, 28 U.S.C. §1738, apply to suits brought under 42 U.S.C. §1983. In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), Barrentine v. Arkansas-Best Freight Systems, Inc., 450 U.S. 728 (1981), and Kremer v. Chemical Construction Co., 456 U.S. 461 (1982), this Court indicated that union grievance arbitrations

should not be given preclusive effect in individual claims arising under other federal statutes.

Moreover, Kremer indicated that because the arbital forum is procedurally inferior to state courts and administrative boards, and because arbitrators' expertise is the law of the shop, not the law of the land, arbitration hearings are not subject to the requirements of 28 U.S.C. §1738. 456 U.S. at 477-478. These precedents require that actions under §1983 to redress violations of constitutional rights not be precluded by an arbitration of a grievance arising under a union contract.

This Court was correct in Gardner-Denver, Barrentine, and Kremer to conclude that labor arbitration hearings are procedurally inferior to

those of a judicical forum. They are inadequate for adjudicating statutory or constitutional rights. Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. at 742-745.

Labor-management arbitrators are specialists. Their expertise is the "law of the shop," not the "law of the land." Kremer, 456 U.S. at 478; Barrentine, 450 U.S. at 743. Thus, even if permitted to do so, there is no reason to believe that a labor-management arbitrator would competently apply a statute like Title VII, the FLSA, or §1983 to an employee's grievance.[1/] "The

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[1/] Indeed, Chief Justice Burger and Justice Rehnquist, who dissented in Barrentine because they believed wage claims were within the specialized competence of labor arbitrators, indicated that reliance upon arbital decisions to adjudicate civil rights claims could "[undermine] enforcement of fundamental rights Congress intended to protect." 450 U.S. at 750. According to Chief Justice Burger, adjudication of such claims requires reference

arbitrator's future employment depends upon his acceptability to [the union and management] or to groups sharing their interests as distinguished from the individual aggrieved . . . ." Meltzer, Labor Arbitration and Conflicting Remedies for Employment Discrimination, 39 U. Chi. L. Rev. 30, 44 (1971). Moreover, a labor-management arbitrator's authority arises from the contract, not from remedial statutes, and should an arbitrator decide a grievance on the basis of §1983, this Court has recognized that the arbitrator has "exceeded the scope of the submission," and his award will not be enforced. Gardner-Denver, 415 U.S. at 53. Since arbitrators are bound by the

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1/continued: to public law concepts, rather than the "law of the shop." Id. Here, the enforcement of Petitioner's rights would not just be undermined, it would be eliminated altogether since the arbitrator did not consider Petitioner's First Amendment claims.

contract, they cannot provide all the relief to which an individual may be entitled under a parallel statute such as §1983. Barrentine, 450 U.S. at 745.

Perhaps the most significant, and often overlooked inadequacy of labor arbitration is that the aggrieved individual has no control over the presentation of his grievance. The arbitration is between the union and the employer. The union is the party, not the employee. Most collective bargaining agreements provide that the union and management select the arbitrator. The union chooses the lawyer to present the grievance and the employee's attorney is not even allowed to participate in the proceedings. The union decides which witnesses to call to testify. The union decides how to frame the issues and develop the argument. Since

the employee is not a party, he has no rights to judicial review. As Justice Powell stated in Gardner-Denver:

> In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. 415 U.S. at 58, n.19.

To bind the employee by a proceeding in which he could not participate as a party with the full rights usually accorded a party violates due process of law. Lack of control of the presentation of the evidence and the argument deprives the employee of a "full and fair opportunity to litigate" his claim. In Kremer v. Chemical Construction Co., 456 U.S. 461 (1982) the Court relied on the ability of a complainant to present his charge as one indicator that the "full and fair opportunity to litigate" test was met. The Court

indicated that the complainant had "'the right to submit all exhibits which he wishes to present and testimony of witnesses in addition to his own testimony.'" Id. at 483 quoting State Div. of Human Rights v. New York State Drug Abuse Comm'n, 59 A.D.2d 332, 336, 399 N.Y.S. 2d 541, 544 (1977). The Court also relied on the complainant's rights to rebut evidence submitted by the employer and to have an attorney represent him. Petitioner here lacked control of the presentation of his grievance in the arbitration and was therefore denied his "full and fair opportunity to litigate." See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979) and Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 333 (1971).[2/]

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[2/] The question of whether the trial judge below exceeded his authority

Such lack of control over the arbitration is especially significant here, because Petitioner asserts that he was discharged on account of the exercise of his First Amendment right to free speech. It is conceivable that Petitioner's interests diverged not only from the City's, but also from those of the very union that represented him at arbitration. This is indicated by the fact that Petitioner sued his union in this action for inadequate representation. Under such circumstances, Petitioner should not be barred by the result of a proceeding in which he did not

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2/ continued: by admitting the arbitration decision into evidence is not before the Court. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n. 21 (1982). Presumably any arbitration proceeding which does not meet the due process requirements of a "full and fair opportunity to litigate" should not even be admitted into evidence, particularly before a jury in a §1983 damage action.

control the presentation of his grievance.

The Restatement (Second) of Judgments would also deny both issue preclusion and claim preclusion for labor arbitrations in this situation. According to the formulation adopted by the Restatement, the arbitration would not be entitled to claim preclusion to bar Petitioner's §1983 action because the arbitrator was not authorized to hear the §1983 claim or provide a damage remedy. Under Section 26 of the Restatement, these limitations on the subject matter jurisdiction of the arbitrator would foreclose giving the award preclusive effect upon Petitioner's §1983 claim. Restatement (Second) of Judgments §26 (1982).

Also, the Restatement (Second) of Judgments would allow Petitioner

to litigate his §1983 claim because the "scheme of remedies" provided by §1983 permits litigation of the §1983 claim. Since §1983 creates an independent action, as argued above, the §1983 claim would not be barred. Restatement (Second) of Judgments §84(2) (1982).

Nor would the Restatement grant issue preclusion to the arbitrator's decision that Petitioner was properly discharged "for cause." Under Section 28 of the Restatement, Petitioner would not be bound on this issue because he could not have obtained review of the arbitration for the correction of errors. Since only the union could seek review of the arbitrator's decision, only the union is bound on the "for cause" issue in further litigation.

The labor grievance arbitration would also not be given preclusive effect on the "for cause" issue because

of the informality and nonjudicial nature of the procedures. Restatement (Second) of Judgments §83(b-e)(1982). Justice Powell described the inadequacies of labor arbitrations in Gardner-Denver:

> [T]he fact-finding process in arbitration usually is not equivalent to judicial fact-finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. 415 U.S. at 57-58.

The Restatement would also not grant preclusion on the "for cause" issue because the employee is not a party. Since the union is the party, the Restatement would bar the union but not the employee. The Restatement provides that arbitration awards are entitled to the same effect as a judgment of a court except

if the arbitration procedure lacks the elements of adjudicatory procedure required by the Restatement to give preclusive effect to decisions of administrative tribunals. Restatement (Second) of Judgments §84(3)(b)(1982). One of the procedural requirements for administrative tribunals is: "The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties. . ." §83(2)(b). Since the employee does not have these procedural rights on behalf of either himself or the union, the employee is not bound by the arbitration award.

The Comment to §83, which is incorporated into the standards for arbitrations under §84, shows that the employee must have the rights of a party before he can be bound. "In some types

of administrative proceedings, the victim of a statutory wrong may complain to the agency but not be given initiative or control of an enforcement proceeding. In such circumstances the agency rather than the victim is the party to whom the rules of res judicata apply. . . ." Restatement (Second) of Judgments, §83, Comment C (1982). Therefore the union is bound by the arbitration but not the Petitioner who was not a party and did not control the presentation of the evidence and argument in support of the grievance.

B. This Court should adhere to its decisions limiting the preclusive effect of arbitration awards in union grievance proceedings.

The Circuit Court's decision should be reversed because this Court's precedents show that no more weight should be accorded to the arbitrator's decision than that given by the District Court when it admitted it into evidence.

Allen v. McCurry, 449 U.S. 90 (1980) held that general rules of preclusion apply to §1983 cases. In Allen the question presented was whether collateral estoppel would apply to a §1983 case raising Fourth Amendment issues. The Fourth Amendment issues had been previously adjudicated in a motion to suppress evidence at the criminal proceeding in which the Petitioner had been convicted. While not deciding whether the particular facts and circumstances of the criminal proceeding justified giving it any preclusive effect, the Court did conclude that §1983 cases are governed by "traditional" rules of res judicata and collateral estoppel. Id. at 99. The Court remanded the issue to the trial court to determine how the "conventional" doctrine of collateral estoppel applies to the particular facts and circumstances in McCurry's case. Id. at 95, n.7.

The Court further held that the legal standards of 28 U.S.C. §1738, the federal

full faith and credit statute, apply to §1983 actions. Since this court stated in Kremer that arbitration decisions are not included within §1738, this Court should apply its precedents and deny preclusive effect to arbitration decisions in §1983 actions.

Applying the Allen holding to this case, the Sixth Circuit's decision should be reversed and Petitioner's judgment reinstated because this Court's prior decisions show that preclusive effect should not have been given to the labor arbitrator's decision. This Court has consistently refused to grant preclusive effect to an arbitrator's decision where the aggrieved employee subsequently seeks to vindicate an individual right of federal statutory origin which arises independently from the employee's collective rights under the collective bargaining agreement.

Most recently, a labor arbitration of a wage dispute was held not to preclude

an individual employee from bringing an action for violation of the minimum wage provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §201, et seq. Barrentine v. Arkansas-Best Freight System Inc., 450 U.S. 728 (1981). The Court emphasized the individual nature of FLSA rights, in contradistinction to collective contract rights. Id. at 739. It concluded that individual FLSA rights could not be waived by an agreement to submit contract claims to arbitration.

The most analogous decision to this case is Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) in which the Court denied full preclusive effect to a labor arbitration in a subsequent Title VII action. Rather, it ruled that the arbitration may be admitted into evidence and accorded such weight as the trial court deems appropriate. The Court held that the existence of an arbitration clause in a collective bargaining agreement did

not prospectively waive the individual employee's right to bring a later action under Title VII. Rights arising under Title VII were found to be vested in the individual employee and to be independent of those conferred by the collective bargaining agreement.

In Gardner-Denver, Justice Powell, writing for a unanimous Court, upheld the employee's action under Title VII, even though the union contract contained a non-discrimination clause and the issue of discrimination had been presented to the arbitrator. According to the Court's reasoning in Gardner-Denver, Title VII rights do not concern majoritarian processes, that "[o]f necessity, the rights conferred [by Title VII] can form no part of the collective-bargaining process. . ." 415 U.S. at 51.

Submission of a grievance to arbitration was also not deemed sufficient to constitute a waiver of the federal statutory

claims under Title VII arising out of the same facts. Gardner-Denver, 415 U.S. at 52. Justice Powell recognized that labor arbitrations of union grievances are designed to resolve only rights under the collective bargaining agreement and not rights arising under other federal statutes creating distinct rights and remedies for individual employees.

According to Gardner-Denver, waiver of Title VII rights by the union's decision to take a grievance to arbitration would therefore amount to an unwarranted concession by the union of an employee's federal statutory rights in return for obtaining grievance arbitration, a right the employee already had. Id. This Court noted that any effective post-dispute waiver of Title VII rights would have to be voluntary and knowing. "In no event can the submission to arbitration of a claim under the nondiscrimination clause of a collective-bargaining agreement con-

stitute a binding waiver with respect to an employee's rights under Title VII." Id. at 52, n. 15.

The rationale for the no-waiver rules of Gardner-Denver and Barrentine is equally applicable to Petitioner's instant suit under §1983. First, §1983 also created a new cause of action for individuals to obtain redress for deprivations of their constitutional rights. Prior to the enactment of §1983, no individual actions were provided to obtain relief from violations of constitutional rights by state and local authorities. Allen v. McCurry, 449 U.S. at 98-99.

Second, the federal courts are assigned the primary responsibility for enforcing the rights created by §1983. Indeed the role of the federal courts is paramount in resolving §1983 claims. Monroe v. Pape, 365 U.S. 167 (1961); Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982).

Third, §1983 provides even more direct access to federal court than does Title VII. Administrative procedures for the investigation and conciliation of claims are required under Title VII prior to resort to federal court, whereas §1983 does not require any prior administrative procedures. When Congress enacted §1983 it contemplated that individuals denied Constitutional rights were to be accorded a judicial remedy, not a remedy to be rendered by an administrative tribunal or an arbitrator.

Petitioner should not be deemed to have waived his individual rights to bring this action. Just as with Title VII, §1983 vests individuals with a cause of action. Rights under §1983 should not be foreclosed because the employee was a member of a union with an agreement to arbitrate contract claims. Nor should the union's submission of a grievance to arbitration bar the employee. Since

Petitioner never submitted his First Amendment claims to arbitration, his §1983 judgment should be sustained.[3/]

In the case at bar the collective bargaining agreement was between the United Steelworkers and the City of West Branch. As a public sector agreement, it is not subject to the provisions of the Labor Management Relations Act, which endorses non-judicial methods as the preferred form of dispute resolution under collective bargaining agreements. 29 U.S.C. §§152(2), 173(d). Nonetheless, because labor arbitrations in the public and private sectors are identical processes, there

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[3/] Amicus does not mean to argue that claims under §1983 may never be submitted to binding arbitration. An aggrieved individual may, after a dispute has arisen, waive his rights under §1983 by an independent, knowing, and voluntary agreement with his adversary to submit such a claim to an arbitrator. Resolution of a §1983 claim by methods already provided by the union contract should never qualify. Such a waiver would be without consideration since it would be based upon an employee's exercising a right he had all along as a member of the bargaining unit. See Gardner-Denver, 415 U.S. at 52, n. 15.

is no reason for this Court to conclude that public sector grievance arbitration decisions should be granted any greater deference than private sector decisions.

Since public employees are often prohibited from striking, their only recourse may be to arbitration to resolve their grievances. Making these decisions preclude §1983 actions would only exacerbate tensions in public sector employee relations because many grievances would not be brought to arbitration in order to preserve §1983 actions.

This result would also operate to increase the federal court's caseload. Many employees prevail in arbitrations or are satisfied with being heard and do not bring §1983 cases. Forced to make a choice between their §1983 rights and their rights under the union contract, many will choose to pursue their §1983 rights in federal court and forego using the grievance procedures. Thus, in either

the public or private sector, decisions of labor arbitrators should not be given preclusive effect when an employee asserts individual statutory or constitutional rights in a subsequent §1983 civil rights action.

Affirmance of the Circuit Court below would be inconsistent with the reasoning of this court in both Barrentine and Gardner-Denver, in which the Court stated that both collective and individual statutory remedies are equally available to an aggrieved employee, and that "certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums." Gardner-Denver, 415 U.S. at 50; Barrentine, 450 U.S. at 745-746.

C. Labor Arbitrations are not accorded preclusive effect under 28 U.S.C. §1738.

This Court should also follow its reasoning in Kremer v. Chemical Construction Co., 456 U.S. 461 (1982) that 28 U.S.C.

§1738 does not require federal courts to give full faith and credit to labor arbitrations of union grievances. This Court explicitly recognized that labor arbitration decisions are not subject to the mandate of 28 U.S.C. §1738. Section 1738 requires that:

> The records and judicial proceedings of any court of any such State. . . shall have the same full faith and credit in every court within the United States. . . as they have by law or usage in the courts of such State. . .

In Kremer, the Court held that a plaintiff seeking relief under Title VII is barred when a state court has issued a final adjudication upon his discrimination charge. Justice White, writing for the majority in Kremer, considered the relationship between labor-management arbitration and §1738 when he distinguished the holding in Kremer from that of Gardner-Denver. Justice White stated:

> The holding in Gardner-Denver was that a private arbitration decision concerning an employment discrimination claim did not bind the federal courts.

> Arbitration decisions, of course, are not subject to the mandate of §1738.

Kremer, 456 U.S. at 477.

The rationale underlying this conclusion was made clear by Justice White in the subsequent paragraph of the majority opinion in Kremer:

> The arbitrator's specialized competence is "the law of the shop, not the law of the land," and "the fact finding process in arbitration usually is not equivalent to judicial fact finding." [Gardner-Denver, 415 U.S. at 57] These characteristics cannot be attributed to state administrative boards and state courts.

Id. at 478. Indeed, §1738 does not contemplate according full faith and credit to arbitrators' decisions, but only to "records and judicial proceedings" of the states.[4/]

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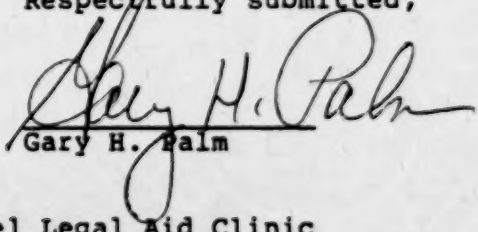
[4/] 42 U.S.C. §1988 also supports reliance on the federal standard set out in Gardner-Denver and Barrentine. Under Section 1988, actions under §1983 are to be adjudicated "in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect. . . ." 42 U.S.C. §1988.

Petitioner here seeks to vindicate individual rights which arise under the First Amendment and §1983. These rights arise from a legal source independent of his collective rights under the agreement between the United Steel Workers and the City of West Branch. General rules of preclusion, as applied by this court to labor arbitration in the Gardner-Denver, Barrentine, and Kremer cases, require that Petitioner's judgment under §1983 be reinstated.

## CONCLUSION

For the foregoing reasons the judgment below should be reversed.

Respectfully submitted,



Gary H. Palm

Gary H. Palm
Edwin F. Mandel Legal Aid Clinic
of the University of Chicago
Law School and Legal Aid Bureau
United Charities of Chicago
6020 South University Avenue
Chicago, Illinois 60637
(312) 962-9611

Counsel for Amicus Curiae Edwin F. Mandel Legal Aid Clinic